No. 11,151

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE LOGIN CORPORATION (a corporation),
Appellant,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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To the Honorable Francis A. Garrecht, Presiding Judge, and to the Honorable Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

THE REASONS FOR THIS PETITION.

The Court has refused to determine the only question presented to it by the parties in the agreed statement and stated by them to be the *one* question at issue. Instead it has affirmed the judgment by deciding another question which was not before the Court under Rule 76, and which the parties agreed imposed no liability on appellant.

The Court's decision holds that two facts appearing in the record bring the sales in question within price control. This is directly contrary to the record.

The two grounds relied upon by the Court, having been excluded from the issues by the parties, were not raised, or at issue, in the lower Court; were not presented or agreed by the briefs on appeal; and were not raised by this Court at oral argument.

Consequently, the appellant has never had the opportunity, either in this or the lower Court, to be heard on the grounds on which judgment is being entered against it. This petition is its first and only opportunity to present its views.

For these reasons this petition is filed. Relying upon the fairness of the Court, we trust it will be accorded the same attention as an appellant's opening brief.

SUMMARY OF GROUNDS ON WHICH REHEARING IS ASKED.

1. The Court's ruling that regardless of whether appellant was a selling agent, certain facts bring the sales within price control is contrary to the record, the agreement of the parties, and the theory of the case in the lower Court.

2. The opinion erroneously states the first fact on which it relies, namely, the time the lobster was imported into the United States. The opinion erroneously states the record shows that the arrival *preceded* the sales. The record does *not* show this.

3. The opinion erroneously construes the exemption of the Maximum Import Price Regulation to require a purchase to be by a person dealing directly with an agent whereas the Regulation itself plainly does not do so. Other official statements of the Price Administrator show the Court's construction to be incorrect.

4. Where the parties present an agreed statement as the record, the Court should decide the question submitted to it by the parties as the only point in issue. It has not done so here.

ARGUMENT.

I.

THE COURT'S RULING THAT REGARDLESS OF WHETHER APPELLANT WAS A SELLING AGENT, CERTAIN FACTS BRING THE SALES WITHIN PRICE CONTROL IS CONTRARY TO THE RECORD, THE AGREEMENT OF THE PARTIES, AND THE THEORY OF THE CASE IN THE LOWER COURT.

The Court has never had called to its attention, and has entirely overlooked, that portion of the record on appeal showing that the sales in question were not subject to price control if appellant was a selling agent. Its decision that "regardless of whether or not appellant was the selling agent" the General Regulation was applicable, is directly contrary to it.

The complete record was not brought up in this case. Instead, an agreed statement, under Rule 76 was presented as the record. It contains (Tr. pp. 3-10) specific facts dealing mostly with the question of agency (the

Stipulation of Facts agreed upon in pre-trial conferences); and (Tr. pp. 14, 15) a general statement of fact, agreed upon in the preparation of the record on appeal, that the transaction was not subject to price control, if appellant was a selling agent.

This "general" statement of fact that the transaction was not subject to price control in this event is equally important with the more specific stipulation—perhaps more so to this Court because it was prepared as part of the record for this Court to enable it to determine this appeal. For this purpose the parties agreed that this was the fact:

> "If they were such (purchases by persons dealing with a selling agent), *the transaction* (the sale of the 334 cases) *was not subject to price control.*" (Agreed Statement, Tr. pp. 14, 15—matter in parentheses and emphasis ours.)

The ruling of this Court that,

> "* * * regardless of whether or not appellant was the selling agent of a foreign seller, the General Regulation was applicable."

is directly contrary to the facts agreed upon by the parties.

For this reason alone, we submit, this petition should be granted and the case decided upon the only question submitted to the Court, and the only one on which the liability of the appellant depends—namely: Did the lower Court err in ruling as a matter of law that appellant was not a selling agent?

There is no doubt that the record as quoted speaks the understanding of the parties, and that the proceedings in the lower Court and in this Court were to resolve the one and only question it presented—namely: Was appellant a selling agent?

Until the handing down of this Court's decision this has been the only issue in this case. If appellant was a selling agent, the parties were agreed that the facts did not bring the transaction within price control.

The question was not whether the dealing with a selling agent was direct or indirect, or when the lobster arrived in the United States. These facts were not in issue, because they were covered, and excluded from consideration, by the agreement that there was no liability if appellant was a selling agent.

That the only issue in this case was that raised by the record as quoted is clear beyond question from the acts of the Price Administrator. The Administrator has never questioned appellant's statement of the point at issue in the lower court (Tr. p. 20):

> "(a) * * * the question to be determined by the trier of fact in the lower court was whether, as to the 334 cases of lobster, these were purchases by persons who dealt with the 'selling agent' of a foreign seller within the meaning of the Maximum Import Price Regulation."

The Administrator's brief states at page 3:

> "The issue is * * * (App. Br. p. 5), whether these sales in December were made by Login as an independent seller * * *, or were made by Login as selling agent of the foreign seller * * *"

and again at page 14:

> "The parties having stipulated as to all the material facts, the sole issue left was whether from the facts shown the legal status of selling agent was made out, * * * and the resolution of this question was for the court, not the jury."

It was toward the resolving of this issue that the parties stipulated as to the facts regarding it. They did not stipulate to facts surrounding other questions not at issue, whether for instance the sales were made after the arrival of the goods—the best evidence of which perhaps is the fact that the stipulation, otherwise detailed, does not even mention the day or month of arrival of the goods in this country; nor state whether it preceded or succeeded the sales.

It was on this issue that the pretrial conferences and arguments were had, and it was on this issue that the Court ruled and finally entered judgment against the appellant.

It was on this agreement, stated in the record as quoted, that this appeal was taken by appellant. It was because the Price Administrator agreed to its incorporation in the agreed statement that the record is presented in this fashion, rather than the complete record covering all the proceedings in the lower Court. It meets the issue raised by the agreement of the parties as to the facts—not other issues not in question.

The appellee could not now, and *indeed its brief does not* contend that other issues were at stake and that the appellant has failed to establish them. Nor

could appellant, had judgment been in its favor, contend on appeal by the Price Administrator that he had failed to prove other issues.

Neither, we submit, under well settled rules of law, should this Court affirm a judgment in favor of appellee upon such grounds, contrary to the agreement of the parties as to the facts, and the understanding upon which the case proceeded in the lower Court and on appeal:

> "And all the way through the procedure, to judgment, the case was tried upon that theory. At no time did plaintiff suggest or intimate the theory upon which he now relies, * * * and now to affirm a judgment for a reason apparently never thought of by the lower court or either party to the controversy would hardly be consistent with the spirit of modern judicial administration. Very generally is applied the rule that a theory accepted and acted upon by all in the trial court cannot be repudiated in the appellate court. Peck v. Heurich, 167 U.S. 624, 17 S. Ct. 927, 42 L. Ed. 302; Westlake Merc. F. Co. v. Merritt (Cal. App.), 262 P. 815."
>
> *Sacramento Co. v. Melin* (C.C.A. 9), 36 Fed. (2d) 907.

To do so, we submit, is to render judgment against the appellant because of alleged failure to prove facts which the appellee who brought the action agreed were not in issue and did not establish liability. It is to hold that two facts in a stipulation directed primarily to the agency aspect of the transaction bring the case within Price Control *when the Price Adminis-*

trator itself has agreed the actual fact is that the entire transaction—not only so much of it as is shown by the stipulation, *but the transaction as it occurred in fact—was not within price control if the appellant was a selling agent.* It in effect, is to render judgment against the appellant on facts which the Price Administrator has agreed with appellant did not subject him to judgment.

The truth of this statement is shown by appellee's own position in its brief, contrasted with the language of the opinion of the Court. The opinion states:

> "It, the Maximum Import Price Regulation, does not, as appellant seems to think, except from the provisions of the General Regulation all sales made by selling agents of foreign sellers. * * * Hence regardless of whether or not appellant was the selling agent of a foreign seller, the General Regulation was applicable."

But the Price Administrator *agreed* that the actual fact in *this* case is that the General Regulation *was* not applicable, and the Import Price Regulation *did* exempt *these* sales if *this* appellant was a selling agent. It has so stated in the agreed statement on appeal:

> "If they were such (purchases by persons dealing with a selling agent), *the transaction* (the sale of the 334 cases) *was not subject to price control.*" (Agreed Statement, Tr. pp. 14, 15—matter in parentheses and emphasis ours.)

and in its brief, page 3:

> "*The issue is,* as stated in Appellant's Brief (App. Br. p. 15), *whether these sales* in December were

made by Login as an independent seller—in which case the sales were subject to, and because in excess of its ceilings in violation of, the General Maximum Price Regulation; or *were made by Login as selling agent* of the foreign seller—*in which case they are covered by the Maximum Import Price Regulation* (8 F.R. 11681) (R. 14, 15) (and therefore exempt from the General Maximum Price Regulation)." (Emphasis and matter in parentheses ours.)

The appellant, we respectfully submit, should not be held liable in damages to the Price Administrator on facts which the Administrator has agreed do not make it liable, if appellant was a selling agent. For the Court to so rule finally, would result in rendering judgment against the appellant upon the grounds it has never had the opportunity of meeting or preparing a record for; going to points which the parties agreed were not in issue and did not constitute liability and depriving it of a hearing on them in the trial Court despite its request for a trial by jury on all issues.

We respectfully submit that a miscarriage of justice will result in this case unless the Court grants a rehearing and decides the case upon the question submitted to it and upon which appellant's liability really turns.

II.

THE OPINION ERRONEOUSLY STATES THE FIRST FACT ON WHICH IT RELIES, NAMELY, THE TIME THE LOBSTER WAS IMPORTED INTO THE UNITED STATES. THE OPINION ERRONEOUSLY STATES THE RECORD SHOWS THAT THE ARRIVAL PRECEDED THE SALES. THE RECORD DOES NOT SHOW THIS.

The opinion construes the Import Price Regulation language* to require that the goods be imported *after* the sale. Assuming this construction to be correct, it does not in *this* case afford a reason for affirming the judgment.

The Court concludes the lobster here was imported *before* the sale and therefore not within the exception of the Regulation. The reasons assigned by the Court for its conclusion is its statement that the record shows:

1. That it was imported into the continental United States prior to the sale, and

2. Was in the continental United States at the time of the sale.

Neither is correct. The record does not show it was imported before the sale. It does not show it was in the United States at the time of the sale.

The plain truth of the matter is that the record *is silent* on the *date of arrival* of the goods into the

*"Neither this regulation nor any other price regulation (unless it contains express provision governing such purchases) shall apply to the purchase of any commodity to be imported into the continental United States by any person who deals directly with a foreign seller whose place of business is located outside the continental United States or with his selling agent wherever located." (8 F.R. 11681.)

United States; *does not state the exact date* in December on which the *sales* were completed, and *makes no attempt* whatever to relate *the time of sale* to *the time of arrival.*

The silence of the record is significant. Of all the facts on which the parties finally agreed, the easiest to determine was the date of importation—had it been deemed material, or at issue. The parties did not stipulate as to these facts because they were not at issue. In *this* transaction, they were agreed, liability did not turn on date of arrival as related to the date of sale. It turned solely on whether appellant was a selling agent.

The closest approach in the record, to the relationship between the two events, is the fact that the goods were shipped in February and March from Florida to California. (Tr. p. 8.) The date of arrival in Florida from Cuba does not appear. The sales, the record shows, were made in December, the exact date not being specified.

This Court therefore is now in the position of affirming a judgment in favor of the appellee for the stated reason that regardless of whether appellant be an agent the facts stipulated to show the lobster arrived before the sale *when the appellee has agreed that in fact there was no liability if the appellant was a selling agent, and the record does not show the lobster arrived before the sales.*

The result is that the Court in effect is allowing judgment to be affirmed against the appellant on a

charge on which it has never had the opportunity to be heard either in the lower Court or here—and this because the appellee agreed, in effect, it was not in issue.

We submit that in simple justice this Court should not affirm judgment against the appellant in favor of appellee on the basis of "facts" which the record does not show, when the appellee itself has agreed on all the facts there is no liability if the appellant be a selling agent.

III.

THE OPINION ERRONEOUSLY CONSTRUES THE EXEMPTION OF THE MAXIMUM IMPORT PRICE REGULATION TO REQUIRE A PURCHASE TO BE BY A PERSON DEALING DIRECTLY WITH AN AGENT WHEREAS THE REGULATION ITSELF PLAINLY DOES NOT DO SO. OTHER OFFICIAL STATEMENTS OF THE PRICE ADMINISTRATOR SHOW THE COURT'S CONSTRUCTION TO BE INCORRECT.

The final reason assigned by the Court for its affirmance of the judgment is that the language of the Import Regulation requires that a purchaser deal directly with the selling agent. The Court's conclusion therefrom that the sales therefore are subject to price control, even though appellant was a selling agent, is again directly contrary to the record and the agreement of the parties that the fact here is that these sales *were not* subject to price control if the appellant was a selling agent.

While it is true that the question at issue as stated by the agreed statement on pages 14 and 15 of the

transcript may technically be broad enough to include the question of whether the dealing with the selling agent was "direct" or "indirect" it is submitted it is apparent beyond any doubt that the sole question at issue was whether appellant was a selling agent; not whether the dealings were direct or indirect, and that if it was a selling agent the sales were not subject to price control. The appellee has never at any time contended to the contrary, and its own statement in its brief at page 3 indicates its complete agreement with this position:

> "The issue is * * * whether these sales * * * were made by Login as an independent seller * * * or were made by Login as selling agent of the foreign seller * * *"

The case having thus been tried and the record on appeal prepared on the agreement that the transaction was not subject to price control if Login was a selling agent, it is, we submit, manifestly unfair to affirm the judgment in favor of the appellee even though appellant is a selling agent, on this other ground which the parties have agreed did not impose liability.

All that has been said under the prior heading of the argument applies with equal force here. We do not repeat it here. The appellee itself could not now claim an appeal—and has not—that it could recover judgment, if appellant is a selling agent. It is therefore, we submit, error for the Court to affirm judgment in its favor even though appellant is a selling agent.

However, regardless of the foregoing, the Court, we submit, is in error in construing the language of the

Import Regulation to require that the purchaser must deal *directly* with the selling agent, in order that the sale fall within the exemption.

To properly construe the language it must be considered and analyzed in light of its use in the Regulation by the Price Administrator. This history has not been called to the Court's attention in this connection. It will be here. So analyzed, the language means to say this:

> "Neither this regulation nor any other price regulation (unless it contains express provision governing such purchases) shall apply to the purchase of any commodity to be imported into the continental United States by any person who deals:
>
> (1) directly with a foreign seller whose place of business is located outside the continental United States, or
>
> (2) with his selling agent wherever located."

The word "directly" qualifies the phrase "with a foreign seller", not the phrase "with his selling agent". Its function is to emphasize, by contrast, the latter phrase, and make clear that dealings with a foreign seller, not directly, but through his selling agent, are treated the same as dealings directly with the foreign seller, without the intervention of the agent.

The purpose of the language is this: Prior to its enactment, the O.P.A. had limited exemption from price control to purchases made *directly* from a foreign seller. Purchases, indirectly, through his selling agent were not exempt. The O.P.A. then reversed its

position as to selling agents and issued substantially the provision now under consideration (in Revised Supplementary Regulation No. 12) to extend the exemption to dealings with the foreign seller which were "not direct" but made through his selling agent.

Its purpose was *not* to require that dealings with the selling agent be "direct" so as to eliminate dealings through a food broker.

The official statement issued by the Price Administrator when the language was first issued to effect the change makes this clear:

The language was first used in Revised Supplementary Regulation No. 12* issued December, 1942, then governing imports. The meaning of the language is stated by appellee in its statement of considerations issued at the same time in connection with and explaining the Revised Supplementary Regulation No. 12. It stated in part:

> "The changes in this revision may be summarized as follows:
>
> 1. * * *
>
> 2. Purchases of commodities from abroad *from an agent* of a foreign seller in this country *are treated as direct purchases from a foreign seller* and are exempt from the General Maximum Price Regulation * * *"

"On May 21, 1942, shortly after the G.M.P.R. became effective, the O.P.A. announced that the

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*"This regulation shall not apply to:
(a) purchases of commodities to be imported by a person who deals directly with the seller or his selling agent wherever located." (Sec. 1499, 1404 Rev. Sup. Reg. No. 12; 7 F.R. 10532.)

> price at which goods might be purchased from a foreign seller was not subject to the provisions of that regulation if the domestic importer dealt *directly* with the seller in a foreign country, although the importer's resale in the United States was under the G.M.P.R. That interpretation is now embodied in this revision. *However, the exemption embodied in this revision includes the purchases made through the selling agent of a foreign seller contrary to the prior interpretation publicly issued.* The reason for this change is that it has been established that agents of foreign sellers ordinarily serve only the functions of bringing together the buyer in this country and the seller abroad, and did not have authority to set the price or terms of sale." (Pike and Fisher, O.P.A. Service, paragraph 21, pp. 521, 522.) (Italics are appellant's.)

Thus its purpose is that purchases made through an agent be treated the same as purchases from the foreign seller.

The language as used in Supplementary Regulation No. 12 was continued in Amendment No. 1 issued January 1, 1943, 8 Fed. Reg. 611, and was finally incorporated into the Maximum Import Price Regulation as it existed on the date of the transaction in question. It has always had the same meaning.

Perhaps the best evidence that it was always so used is found in the Import Regulation as it was amended immediately after the transaction in question, effective February 28, 1944, clearly indicating that import of the language is that dealings with the

foreign seller, not direct, but through his selling agent were also exempted. The Regulation as then amended read in Section 1 of Article I:

> "Section 1. *Purchases from foreign sellers*— (a) *Importations from foreign countries.* Neither this regulation nor any other price regulation, except to the extent that it contains express provision making it applicable to such purchases, applies to the purchase of any commodity to be 'imported' into the continental United States from any foreign country, where such purchase is made from a foreign seller, whose place of business is located outside the continental United States, *either directly or through* his selling agent wherever located." (9 Fed. Reg. 2350.) (Emphasis ours.)

We respectfully submit that the appellee's own words demonstrate that the Court's construction of the term *"directly"* is erroneous. It was never meant to exclude from the scope of the exemption of the Import Regulation purchases by one who ordered from a selling agent through a food broker. The Price Administrator has never so decreed, and its attorneys in this case have never so contended at any stage of the proceedings. The language, viewed in light of its usage by the Price Administrator, does not impose such a restriction and should not be so construed. The Court's decision to the contrary we submit is in error.

IV.

WHERE THE PARTIES PRESENT AN AGREED STATEMENT AS THE RECORD, THE COURT SHOULD DECIDE THE QUESTION SUBMITTED TO IT BY THE PARTIES AS THE ONLY POINT IN ISSUE. IT HAS NOT DONE SO HERE.

This appeal does not present the usual case in which the judgment may be affirmed on any ground in the record supporting it. The parties here have proceeded by an agreed statement under Rule 76 and presented but one question to this Court for determination: Did the lower Court err in ruling as a matter of law that appellant was not a selling agent? Under the rule, affirmance or reversal must depend on the answer to that question. The parties have agreed that there is no liability if appellant is a selling agent and have prepared the record to have this Court review the lower Court's determination of this question, and this alone. This they are permitted to do under the rule.

It has been said by the Courts that it is a "commendable procedure" for litigants to present appeals by an agreed statement.

The parties here have done this defining, for the Court, the sole issue to be decided, and stipulating that liability, if any, turns upon it.

Regardless of anything else said in this petition, for these reasons alone, it is submitted this Court should grant a rehearing to decide the question submitted to it by the parties.

The refusal of the Court to determine the question submitted; its searching out some other question for

decision, although the parties were agreed that only the first determined liability, makes a waste indeed of the effort expended by the litigants in reaching an agreement, and we submit, with all due respect, makes either a nullity, or dangerous entrapment of Rule 76 of the Federal Rules of Procedure.

We earnestly request this Court to grant a rehearing and determine the question submitted to it, whether the lower Court erred, in ruling as a matter of law in the face of the facts stipulated to, that appellant was not a "selling agent".

Dated, San Francisco,
June 21, 1946.

KEESLING & KEIL,
FRANCIS CARROLL,
Attorneys for Appellant and Petitioner.

Certificate of Counsel.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
June 21, 1946.

Francis Carroll,
Of Counsel for Appellant and Petitioner.